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No. 10-537

In The Supreme Court of the United States

OSAGE NATION,

Petitioner,

v.

CONSTANCE IRBY, SECRETARY-MEMBER OF THE OKLAHOMA TAX COMMISSION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED

In *Solem v. Bartlett*, 465 U.S. 463 (1984), this Court held that "only Congress can divest a reservation of its land and diminish its boundaries," and Congress's intent to do so must be "explicit[ ]" and "unequivocal," *id.* at 470-471. The Questions Presented are:

I. Whether, in determining whether Congress disestablished an Indian reservation, express statutory text, unequivocal legislative history, and the expert view of the Executive Branch are controlling, as the Second, Eighth, and Ninth Circuits have ruled, or whether, instead, other indicia external to the statutory text and federal government's view, such as modern demographics, can override unambiguous statutory text, as the Tenth Circuit and Seventh Circuit have held.

II. Whether the court properly ruled that the Osage Nation's reservation has been disestablished in the absence of unambiguous statutory direction and without obtaining or considering the position of the United States government.

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STATEMENT OF INTEREST[1]

The National Congress of American Indians ("NCAI") is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian tribes and Alaskan Native villages. Since 1944, NCAI has advised tribes, states and the federal government on a wide-range of Indian issues, including the relevance and legal interpretation of treaties, statutes and executive orders setting aside or establishing reservations as permanent homelands for Indian tribes.

Amicus curiae is deeply concerned that the legal test for disestablishment adopted by a minority of the circuits will allow lower federal and state courts to ignore specific language within a statute or treaty, to overlook the contemporaneous Congressional purpose underlying an allotment or surplus land act, and to simply rely on subsequent historical events and modern demographics to determine reservation status. Diminishment or disestablishment of a reservation—a homeland set-aside for the tribe and its members—is a question of exceptional importance.

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[1] No counsel for a party authored the brief in whole or part. No counsel for a party made a monetary contribution to the preparation or submission of the brief. The counsel of record for each party received timely notice of the intent of *amicus curiae* to file this brief and written consent was granted by each party.

Left unaddressed by this Court, the minority position will open the flood-gates for litigation by anyone who wishes to challenge—for any reason—the status of lands within a reservation as "Indian country." The decision by the lower court will create uncertainty over long-established reservation boundaries which will threaten federal, state and tribal law enforcement efforts. The increasing uncertainty is already affecting the ability of federal agencies to fulfill their statutorily mandated obligations to tribes, and the accompanying economic, social and legal instability is beginning to erode the ability of tribes to achieve self-determination and economic self-sufficiency.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

In their petition for writ of certiorari, petitioner Osage Nation has effectively demonstrated why this Court should grant review of the questions presented. First, it is absolutely clear that the decision below expands and entrenches an inter-circuit conflict over the legal test for disestablishment of an Indian reservation. Pet. at 7-12. Second, the minority position adopted by the court of appeals below—that a reservation can be disestablished without explicit support in the text of the statute or the announced view of the political branches—squarely conflicts with this Court's precedent. Pet. at 12-28. Petitioner has fully articulated the arguments underlying these first two

bases for review by this Court and *amicus* will not repeat those arguments here.

Rather, *amicus* seeks to bring additional relevant material to the attention of the Court in relation to the final basis for review: questions of diminishment and disestablishment are of exceptional importance and are recurring nationwide. As the petitioner warns, the divergence by the court of appeals below from this Court's precedent and from a majority of other circuits will "wreak havoc" throughout Indian country and across the states and federal government. Pet. at 28.

1. The Questions Presented in this Case Are Fundamental to the United States' Policy Supporting Indian Self-Determination.

The question of diminishment or disestablishment of reservation boundaries is one of exceptional importance to Indian tribes nationwide as they pursue self-determination and economic self-sufficiency. Indian self-determination has been the formal policy of the United States government since President Nixon's Special Message to Congress on Indian Affairs in 1970, and has been affirmed by executive order or proclamation by each U.S. President since.[2]

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[2] President Richard Nixon, Special Message to Congress on Indian Affairs (July 8, 1970). For relevant executive orders, see Exec. Order No. 13,336, 69 Fed. Reg. 5295 (Apr. 30, 2004) (President George W. Bush: "This Administration . . . supports tribal sovereignty and self-determination"); Exec. Order No.

(Continued on following page)

Certainty and stability are necessary ingredients for the successful pursuit of these goals. As discussed more fully below, the inconsistency of the disestablishment analysis between the circuits contributes to the confusion surrounding jurisdictional authority in two key areas: (1) whether a tribe, a state, or the federal government has authority to prosecute crimes; and (2) whether a tribe, a state, or the federal government is responsible for social service programs, environmental protection, land use decisions, and business regulation.

13,175, 65 Fed. Reg. 67249 (Nov. 6, 2000) (President William J. Clinton: "[t]he United States . . . supports tribal sovereignty and self-determination."); Exec. Order No. 12,401, 48 Fed. Reg. 2309 (Jan. 14, 1983) (President Ronald Reagan: "the underlying principles of this mission are the government-to-government relationship, the established Federal policy of self-determination and the Federal trust responsibility"). For relevant presidential proclamations, see Proclamation No. 8595, 75 Fed. Reg. 67907 (Oct. 27, 2010) (President Barack Obama: "[This Administration] recommit[s] to supporting tribal self-determination, security, and prosperity for all Native Americans."); Proclamation No. 8313, 73 Fed. Reg. 65491 (Oct. 30, 2008) (President George W. Bush: "My Administration remains committed to protecting tribal sovereignty and the right to self-determination and to working with tribes on a government-to-government basis."); Proclamation No. 7247, 64 Fed. Reg. 60085 (Nov. 1, 1999) (President William J. Clinton: "My Administration is expanding consultation and collaborative decision-making with tribal governments to promote self-determination."); Proclamation No. 6230, 55 Fed. Reg. 48095 (Nov. 14, 1990) (President George H. Bush, "Today, we reaffirm our support for increased Indian control over tribal government affairs, and we look forward to still greater economic independence and self-sufficiency for Native Americans.").

Historically, the relationships between the United States, the States, and Indian tribes have been marked by long periods of conflict with intermittent periods of cooperation. In modern times, these relationships have been marked more by periods of sustained cooperation than conflict. The development of the law during these alternating periods of conflict and cooperation are instructive to the questions presented.

In a series of early Indian law cases referred to as the "Marshall Trilogy," this Court established the key principles underlying the doctrine of inherent tribal sovereignty. *Johnson v. McIntosh,* 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); and *Worcester v. Georgia*, 31 U.S. 515 (1832) ("Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil. . . ."). Felix Cohen, the first and foremost modern scholar of federal Indian law, articulated the principles of the Marshall Trilogy as follows:

> (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, *e.g.*, its power to enter into treaties with foreign nations, but does not itself affect the internal sovereignty of the tribe, *i.e.*, its powers of local self government. (3) These powers are subject to qualification by Congress, but save as thus expressly qualified, full powers of

> internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

FELIX S. COHEN, HANDBOOK ON FEDERAL INDIAN LAW 123 (1941).

It is generally known that allotment and assimilation were adopted as policies by the United States to deal with the "Indian problem." *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 1041 (Nell Jessup Newton ed., 2005). "Allotment is a term of art in Indian law. It refers to the distribution to individual Indians of property rights to specific parcels of reservation." *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1015-16 (8th Cir. 1999) (citing *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 142 (1972)).

Under pressure from westward-bound homesteaders, railroads, mining interests, etc., Congress enacted the General Allotment Act of 1887, 24 Stat. 388 (Feb. 8, 1887), to expedite the allotment process and to apply it to Indian tribes and their reservations nationwide, with limited exceptions (including the Osage Nation). The principle provisions of the General Allotment Act provided for the allotment of commonly held tribal lands to individual Indians, 160 acres to each family head or 80 acres to each single person over eighteen years of age. The United States would hold each allotment in trust for a period of twenty-five years during which time the lands could not be alienated or encumbered.

Initially, the Executive Branch was charged with the responsibility of allotment under the provisions of the General Allotment Act. But Congress became impatient and began to adopt special legislation aimed at individual Indian reservations. REPORT OF THE BOARD OF INDIAN COMMISSIONERS 153 (1889). Thus, the actual allotment of land on many reservations was primarily accomplished through specific legislation, with each allotment or surplus land act employing its own statutory language, the product of a unique set of tribal lobbying and legislative compromise. *See* COHEN'S HANDBOOK at 1041 (2005). As this Court recognized in *Solem v. Bartlett*, 465 U.S. 463 (1984) the modern legacy of these allotment and surplus land acts

> has been a spate of jurisdictional disputes between State and Federal officials as to which sovereign has authority over lands that were opened by the acts and have since passed out of Indian ownership. As a doctrinal matter, the States have jurisdiction over unallotted opened lands if the applicable surplus land act freed that land of its reservation status and thereby diminished the reservation boundaries. On the other hand, Federal, State, and Tribal authorities share jurisdiction over these lands if the relevant act did not diminish the existing Indian reservation because the entire area is Indian country under 18 U.S.C. §1151(a).

Solem, 465 U.S. at 467.

In its 1934 "Report on Land Planning, Part X, Indian Land Tenure, Economic Status and Population

Trends," the Natural Resources Board describes the principal methods for dispossessing tribes of their communal lands:

> *"Ceded" Surpluses After Allotment.*—A practice consistently pursued was to separate all land from the reservation which was left over after a tribe was allotted in severalty, usually by remunerating the members thereof at $1.25 an acre. . . . At least 38,000,000 acres of Indian land were disposed of in this way.
>
> *Surplus Lands Opened to Settlement.*—A similar practice was to throw open surpluses left over after allotment, to settlement by whites, and remunerate the tribes as the lands were entered by homesteaders. At least 22,000,000 acres of Indian land have thus been lost.
>
> *Alienation Through Fee Patents.*—The grant of fee patents at the end of the trust period and the removal of sales restrictions account for the loss of about 23,000,000 acres. Indians who retained their land after coming into full control over it were rare exceptions. The granting of fee patents has been practically synonymous with outright alienation.

NATIONAL PLANNING AND PUBLIC WORKS, NATURAL RESOURCES AND INCLUDING LAND USE AND WATER RESOURCES, NATIONAL RESOURCES BOARD REPORT, PART X at 6 (November 28, 1934).

The assimilation and allotment policies resulted in the impoverishment of Indian people, loss of their land base, and the destruction of their cultural identities. In 1928, the Institute for Government Research issued *The Problem of Indian Administration,* a report sponsored and initiated by the federal government, which examined contemporary life for tribal communities nationwide. LEWIS MERIAM ET AL., INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (1928). The *Meriam Report* conveyed a particularly troubling portrait of the poverty, health risks, weak economic prospects, and lack of access to education in Indian country. At the root of this social malaise, the *Meriam Report* found years of "past policies adopted by the government in dealing with the Indians . . . which, if long continued, would tend to pauperize any race." *Id.* at 7.

In 1934, Congress repudiated this allotment policy in the Indian Reorganization Act ("IRA"), 25 U.S.C. § 478 (2006). In all, over 86 million acres of tribal lands were separated from Indian ownership between 1887 and 1934. During this period, 118 Indian reservations had been allotted, 44 of which had been opened to homestead entry by non-Indians under the public land laws. AM. INDIAN POLICY REVIEW COMM'N, 95TH CONG., FINAL REPORT 309 (Comm. Print 1977).

The IRA provided a Congressionally-sanctioned vehicle for tribes to develop their own forms of government under constitutions approved by the federal

government and to participate in the management of their tribal resources. The IRA refocused Congressional efforts toward acknowledging tribal governments, cultural pluralism, and Indian self-determination in the hope that these new programs would build Indian economies at a time when the country, as a whole, was struggling through the depths of the Great Depression.

In the mid-1940s, the period of Indian reorganization was abruptly abandoned and policies aimed at terminating the federal relationship with tribes were pursued. On July 1, 1952, the House of Representatives passed a resolution calling for legislative proposals "designed to promote the earliest practicable termination of all federal supervision and control over Indians." H.R. Rep. No. 82-2503, 82d Cong. 2d Sess. (1952). On August 1, 1953, Congress passed House Concurrent Resolution 108 calling for Indians to "be freed from Federal supervision and control and all disabilities and limitations." H.R. Cong. Res. 108, 83d Cong., 67 Stat. B132 (1953). And by 1954, Congress had adopted specific acts to terminate over 70 tribes. *See* Charles F. Wilkinson and Eric R. Biggs, *The Evolution of the Termination Policy,* 5 AM. IND. L. REV. 139, 151-54 (1977). And the results of termination were tragic on many levels, in particular, the loss by terminated tribes of their entire land base. *See* COHEN'S HANDBOOK at 94-96 (2005).

Then, during the civil rights era, the pendulum of federal Indian policy swung back toward tribal self-determination. In 1970, President Nixon declared: "Self-determination among the Indian people can and must be encouraged without the threat of eventual termination."[3] In 1975, Congress followed the lead of the Executive Branch and enacted the Indian Self-Determination and Educational Assistance Act, Pub. L. No. 93-638, 25 U.S.C. §§ 450-450e-3 (2006). The policy of Indian self-determination allows Indian tribes to contract for federal funds to administer programs and services for the benefit of tribal members and their communities.

In the modern era, Congress has continued to affirm its support of tribal autonomy in numerous acts and policies: social services and child welfare, *see* Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (2006); housing, *see* Native American Housing and Self-Determination Act of 1996, 25 U.S.C. §§ 4101-4104 (2006); environmental and land use authority (e.g., environmental protection, land use, and zoning) *see* Indian Lands Open Dump Cleanup Act of 1994, 25 U.S.C. §§ 3901-3908 (2006), Indian Energy Act, 25 U.S.C. §§ 3501-3506 (2006); cultural resources protection, *see* Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §§3001-3013 (2006); and economic development, *see* Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701-2721

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[3] President Richard Nixon, Special Message to Congress on Indian Affairs (July 8, 1970), available at http://www.presidency.ucsb.edu/ws/index.php?pid=2573.

(2006), Native American Business, Development, Trade Promotion, and Tourism Act of 2000, 25 U.S.C. §§ 4301-4307 (2006).

The above acts are only a sampling of modern federal Indian legislation, but all have a shared characteristic of highlighting the reality that a tribe's ability to exercise "many of its sovereign powers hinges, in large part, on whether its actions occur in Indian Country." Charlene Koski, *The Legacy of Solem v. Bartlett: How Courts Have Used Demographics to Bypass Congress and Erode the Basic Principles of Indian Law*, 84 WASH. L. REV. 723, 763-764 (2009). In fact, almost every federal program and service available to an Indian tribe stands to be negatively affected by a finding of diminishment or disestablishment of the boundaries of their reservation.

a. Inconsistency in Disestablishment Analysis Complicates the Administration of Criminal Justice Throughout Indian Country and Encumbers Law Enforcement Cooperation Between the United States, Tribes, and States.

The question of disestablishment goes to the very heart of criminal jurisdictional analysis in federal Indian law, whose threshold inquiry is whether an act occurred within "Indian country." Prior to 1948, "Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest: trust lands, individual allotments, and, to a more limited degree, opened lands that had

not yet been claimed by non-Indians." *Solem v. Bartlett*, 465 U.S. 463, 468 (1984) (citations omitted).

The definition of "Indian country," employed in the context of criminal law, was revised by Congress in 1948 when it "uncouple[d] reservation status from Indian ownership." *Solem*, 465 U.S. at 468. Thus, "Indian country" means:

> (a) all lands within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation (b) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory, and whether in or out of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2006).

Thus, since 1948, a non-Indian's ownership of land within an Indian reservation on which a crime is committed does not change its reservation status and remove it from Indian country. *See Beardslee v. U.S.*, 541 F.2d 705 (8th Cir. 1976) (citing *DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975)). As this Court has recognized, only Congress has the power to change a reservation's status, *Solem*, 465 U.S. at 472, and the intent to diminish or disestablish a reservation's boundaries must be clearly

expressed, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998), and will not be lightly inferred. *Solem*, 465 U.S. at 472.

The inter-circuit conflict, as highlighted by the present case, exacerbates the jurisdictional maze that characterizes the administration of criminal justice in Indian country. Although space limitations preclude a full discussion of criminal jurisdiction in Indian country, the chart below provides an abbreviated description to assist this Court in conceptualizing the complexity of this jurisdictional question.[4]

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[4] Samuel E. Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction Over Non-Indians: An Argument for a Statutory Abrogation of Oliphant*, 57 UCLA L. REV. 553, 560 (2009) (This chart is inapplicable to the six mandatory Public Law 280 states in which Congress delegated the federal government's criminal 18 U.S.C. § 1162 (2006) and civil jurisdictional responsibilities over Indian country. 28 U.S.C. § 1360 (2006). For a more detailed description of Public 280s provisions and effects, *see* Vanessa Jimenez, Soo Song, *Concurrent Tribal and State Jurisdiction under Public Law 280*, 47 AM. U. L. REV. 1627 (1998)).

Perpetrator/ Victim	Jurisdiction	Source of Authority
Crimes By Indians Against Indians		
Major Crimes	Federal or Tribal (concurrent)	Indian Major Crimes Act, 18 U.S.C. § 1153 (2006)
Non-Major Crimes	Tribal (exclusive)	Inherent Sovereign Authority
Crimes By Indians Against non-Indians		
Major Crimes	Federal or Tribal (concurrent)	Indian Major Crimes Act
Non-Major Crimes	Federal or Tribal (concurrent)	Indian General Crimes Act, 18 U.S.C. § 1152 (2006) (federal); Inherent Sovereign Authority (tribal).
Victimless Crimes by Indians	Federal or Tribal (federal authorities have jurisdiction over general federal crimes; tribal authorities have jurisdiction over non-federal victimless crimes, such as vandalism or public intoxication)	Inherent Sovereign Authority

Crimes by non-Indians Against Indians	Federal (exclusive)	Indian General Crimes Act (incorporates non-federal state offenses via the Assimilative Crimes Act, 18 U.S.C. § 13 (2000))
Crimes by non-Indians Against non-Indians	State (exclusive)	*United States v. McBratney*, 104 U.S. 621 (1882)
Victimless Crimes by non-Indians	State (exclusive)	

Inconsistency in disestablishment analysis by the courts below further impedes the prosecution of crime, and the protection of tribal and non-tribal communities. At present, the law determining the very boundaries of "Indian country" differs amongst the circuits. The suspicion that is currently cast on a tribe's reservation status, despite unambiguous statutory language evidence and equivocal legislative history, threatens to throw the administration of criminal justice into disarray. This present state of disestablishment analysis may result in more and more litigation over reservation boundaries before it can be determined whether the federal government, the state, or the tribe has authority to prosecute a crime. In the absence of a clear and uniform rule, valuable judicial

resources must be expended to answer this threshold inquiry.

For tribal communities, the potential impacts on the ground will be felt immediately. Today, on average, American Indians experience violent crime at more than twice the rate for the Nation (*i.e.*, 101 victims for every 1000 persons, compared to 41 per 1000). *See* U.S. Department of Justice, Bureau of Justice Statistics, *Statistical Profile, 1992-2002: American Indians and Crime* (2004).[5] In addition, the uncertainty of reservation status may result in an upsurge of federal declinations to prosecute major crimes which, for multiple reasons, already plague Indian country. *See Tribal Law and Order Act: Hearing on S.797 Before the S. Comm. on Indian Affairs*, 111th Cong. 93 (2009).[6]

Left unaddressed, the inconsistency in disestablishment analysis may also impede further cooperative efforts between federal, tribal and state law enforcement agencies. *See Nevada v. Hicks*, 533 U.S. 353, 393 (2001) (noting the "host of cooperative

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[5] Available at http://www.usdoj.gov/otj/pdf/american_indians_and_crime.pdf.

[6] Available at http://indian.senate.gov/upload/Report-111-93.pdf. In a written response to a request by the Senate on Committee Indian Affairs, the Department of Justice reported that Indian country declination rates were 52.2% for Fiscal Year 2007 and 47% for 2008. In comparison, reported declination rates for non-Indian country federal prosecutions were 20.7% for Fiscal Year 2007 and 15.6% for 2008.

agreements between tribes and state authorities . . . to provide law enforcement") (O'Connor, J., concurring). *Amicus curiae* strongly urge this Court to adopt a clear framework on disestablishment analysis in order to reduce jurisdictional confusion and aid cooperation by all sovereign parties engaged in the administration of criminal justice in Indian country.

b. Inconsistency in Disestablishment Analysis Produces Confusion As To Civil Jurisdiction Amongst Sovereign States Which Stymies the Social and Economic Development of Indian Country.

The status of a reservation not only impacts the internal governance of a tribe, but also its external relationships with a state and the federal government. Incongruent application of disestablishment review impairs the operation of these sovereign relationships and prevents tribes from exercising congressionally recognized rights of self-determination and governance. As with criminal jurisdiction, an inquiry into the status of lands as "Indian country" strikes at the core of any determination of civil regulatory authority. "While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction." *DeCoteau v. District County Court*, 420 U.S. 425, 428 n. 2 (1975) (citations omitted).

A simple list of cases on disestablishment and diminishment decided by this Court provide a good illustration of the multifarious effects these doctrines have on either stabilizing or undermining tribal self-determination: hunting and fishing rights, *Mattz v. Arnett*, 412 U.S. 481 (1973); environmental regulation, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); and child welfare and social services, *DeCoteau v. District County Court*, 420 U.S. 425 (1975). Indeed, in *DeCoteau*, Justices Douglas, Brennan, and Marshall in their dissent acknowledged that the case arising out of two consolidated petitions, one of which involved the removal of Indian children, concerned "a problem of domestic relations which goes to the heart of tribal self-government." 420 U.S. at 465 n. 8.

It is of national importance that the Court reduce jurisdictional confusion by providing tribes, states and the federal government with a consistent framework to facilitate the determination of reservation boundaries. As the overview of cases and legislative policies above show, the question of disestablishment affects nearly every aspect of tribal self-governance, thus hindering the ability of tribes to engage in the economic and social development of their communities. Moreover, the jurisdictional uncertainty cast by the question of disestablishment has the ability to place tribes in "sovereign suspension", by preventing them from accessing their congressionally recognized rights of self-determination without

engaging in a costly litigation of their boundaries. Case law already indicates this precarious trend.

In *Michigan v. E.P.A.*, 268 F.3d 1075 (D.C. Cir. 2001), the D.C. Circuit considered whether the Environmental Protection Agency ("EPA"), under its program of treating Indian tribes as "states" for purpose of administering air quality standards developed pursuant to Clean Air Act ("CAA"), 42 U.S.C. § 7601(d) (2006), had authority to administer the program on tribal lands whose status was "in question." The court not only held that a tribe did not have jurisdiction over such lands in question, but that a finding of tribal jurisdiction over land was required through notice and comment rulemaking, rather than on a case-by-case analysis, before even the federal government could assume regulatory jurisdiction. *Id.* at 1089. This essentially means that whenever a party "questions" the status of a reservation, Indian tribes without litigated reservation boundaries cannot operate many environmental programs.

In the petition, Osage Nation effectively demonstrates the conundrum faced by federal agencies across the board when executing their statutory duties on behalf of tribes. Pet. at 23-26. Whether it is the U.S. Department of Justice investigating and prosecuting a murder on the Osage Reservation; the Department of the Interior seeking to defend the tribe's water rights appurtenant to the reservation or enforcing federal liquor laws; or the National Indian Gaming Commission approving a state-tribal gaming compact or enforcing federal gaming laws, each

circumstance illustrates the inability of federal agencies to take any action if reservation boundaries are so easily called into question by reference to subsequent events or modern demographic statistics.

It is of national importance that this Court address this jurisdictional confusion and facilitate Congress' policy of self-determination by providing tribes, states and the federal government with a consistent framework of analysis to determine whether a reservation's boundaries have been diminished or disestablished.

2. This Case Provides An Excellent Vehicle Upon Which to Clarify the Law Governing Diminishment or Disestablishment of Reservation Boundaries.

This case provides a unique opportunity for this Court to affirm the preeminence of statutory language in discerning congressional intent through an allotment act which poignantly lacks any markers indicating diminishment. *See* Pet. at 13-18 (providing an in-depth review of the statutory text). As the court of appeals itself noted, the "operative language of that statute does not unambiguously suggest diminishment or disestablishment of the Osage reservation." *Osage Nation v. Irby*, 597 F.3d 1117, 1124 (10th Cir. 2010). In addition, the Osage Act satisfies three additional factors that weigh in favor of continued reservation status: part of the land was authorized by the Secretary of the Interior to be set aside for tribal purpose; permission by tribal members to

obtain individual allotments before the land was opened; and mineral resources to the tribe were reserved as a whole and never allotted. *Id.* at 1123. Thus, given the Tenth Circuit's admission, their disregard of the probative value of statutory evidence provides this Court with a record that directly and distinctly embodies the disagreement amongst the circuits.

This case also provides a better vehicle for review of the proper standard for holding a reservation disestablished because it lacks the procedural complexity of other cases. This Court recently granted the writ of certiorari in *Madison County v. Oneida Indian Nation*, (No. 10-72), 79 USLW 3062 (U.S. Oct. 12, 2010), first on the question of whether tribal sovereign immunity can be used as a defense in foreclosure proceedings for non-payment of property taxes, and only secondarily on the question of reservation disestablishment. This case singularly presents and focuses the important question of disestablishment, and does so after full consideration and analysis by the court of appeals, unlike in *Madison County*.

The procedural complexity of *Madison County* arises out of the 2001 federal district court decision and the 2003 federal court of appeals decision which both held that the Oneida Indian Reservation was not disestablished. *See Oneida Indian Nation of New York v. City of Sherrill*, 145 F.Supp. 2d 226 (N.D.N.Y. 2001); and *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003). After granting review, this Court refrained from evaluating the question of disestablishment, thus leaving the

reservation's boundaries intact, but holding that the Oneida Nation was subject to the property taxes based on the equitable principles of laches, impossibility and acquiescence. *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 216 n. 9 (2005).

By contrast, this case serves as a better vehicle for the Court to address the inter-circuit conflict since it presents just one overarching legal question: the provision of a uniform framework for disestablishment analysis.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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